Supreme Court, U.S.
FILED
APR 4 2001
CLERK

No. 00-1398

IN THE

Supreme Court of the United States

MARIO JIMENEZ,

Petitioner,

v.

HIALEAH HOUSING AUTHORITY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

EDWARD G. GUEDES
WEISS SEROTA HELFMAN
PASTORIZA & GUEDES, P.A.
Attorneys for Respondent
2665 South Bayshore Drive
Suite 420
Miami, Florida 33133
(305) 854-0800

166161

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Was the Court of Appeals' discretionary decision to dismiss the appeal below for failure to comply with the court's scheduling order and established appellate procedures — after petitioner previously requested and obtained an enlargement of the deadline for filing his brief — in conflict with a precedent of the United States Supreme Court or that of another Circuit Court of Appeals such that a compelling reason exists for this Court to exercise its discretion and issue a writ of certiorari to review this matter?

PARTIES TO THE PROCEEDING

The parties to the proceeding are Mario Jimenez ("Jimenez") and the Hialeah Housing Authority ("Authority"). Jimenez's description of the Authority as a "political subdivision of the City of Hialeah, Florida" is incorrect. The Authority is an independent, quasi-governmental entity created pursuant to Chapter 421, Fla. Stat.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Cited Authorities	iv
Table of Appendices	vii
Statement of Jurisdiction	1
Rules of Appellate Procedure at Issue	1
Concise Statement of the Case	4
Reasons for Denying the Writ	6
The Eleventh Circuit's Decision Below, Which Related To The Judicial Administration Of Its Own Docket, Does Not Give Rise To A Conflict With A Precedent Of This Court Or That Of Any Other Court Of Appeals. . .	6
A. The Eleventh Circuit's Decision Below Does Not Give Rise to a Conflict with a Decision of Another Court of Appeals.	7
B. The Eleventh Circuit's Decision Below Does Not Conflict with a Precedent of this Court.	12
Conclusion	13

TABLE OF CITED AUTHORITIES

Page

Cases:

Agoston v. Commonwealth of Pennsylvania, 340 U.S. 844, 71 S. Ct. 9 (1950) 11

Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir.1981) 9

Brooks v. Fitch, 642 F.2d 46 (3d Cir. 1981) 8

FHC Equities, L.L.C. v. MBL Life Assurance Corp., 188 F.3d 678 (6th Cir. 1999) 11

Foman v. Davis, 371 U.S. 178, 83 S. Ct. 227 (1962) 12

Guam Sasaki Corp. v. Diana's Inc., 881 F.2d 713 (9th Cir. 1989) 9

Jones v. Chaney & James Const. Co., 399 F.3d 84 (5th Cir. 1968) 9, 10

Julien v. Zeringue, 864 F.2d 1572 (Fed. Cir. 1989) .. 9

LaParade v. Kidder Peabody & Co., 1997 WL 529072 (D.C. Cir. 1997) 9

Link v. Wabash R. Co., 370 U.S. 626, 82 S. Ct. 1386 (1962) 12

Cited Authorities

	Page
Louisiana World Exposition, Inc. v. Logue, 746 F.3d 1033 (5th Cir. 1984)	8
Marcaida v. Rascoe, 569 F.2d 828 (5th Cir. 1978)	10
Matute v. Procoast Navigation, Ltd., 928 F.2d 627 (3d Cir. 1991), *cert. denied*, 502 U.S. 919, 112 S. Ct. 329 (1991)	11, 12
Morales v. American Honda Motor Co., Inc., 151 F.3d 500 (6th Cir. 1998)	8
Morrison v. Texas Co., 289 F.2d 382 (7th Cir. 1961)	9, 10
Pinion v. Dow Chemical, 928 F.2d 1522 (11th Cir. 1991)	11
Reyes-Garcia v. Rodriguez & Del Valle, Inc., 82 F.3d 11 (1st Cir. 1996)	8
Slack v. St. Louis County Government, 919 F.2d 98 (8th Cir. 1990)	8
Taylor v. United States, 493 U.S. 906, 110 S. Ct. 265 (1989)	10
Thomas v. Arn, 474 U.S. 140, 106 S. Ct. 466 (1985)	12
Tidwell v. Dees, 464 F.2d 1297 (5th Cir. 1967)	10

Cited Authorities

	Page
United States v. Hanks, 24 F.3d 1235 (10th Cir. 1994)	9
United States v. Sosa, 55 F.3d 278 (7th Cir. 1995)	8, 10
Wrighten v. Glowski, 232 F.3d 119 (2d Cir. 2000)	8
Statute:	
28 U.S.C. § 1254(1)	1
Rules:	
FED. R. APP. P. 31	10
FED. R. APP. P. 31(c)	1
11TH CIR. R. 31-2	1
11TH CIR. R. 31-2(e)	7
11TH CIR. R. 42-2	3
11TH CIR. R. 42-2(e)	11
United States Supreme Court Rule 10	6, 11
United States Supreme Court Rule 10(a)	6
United States Supreme Court Rule 10(b)	6

TABLE OF APPENDICES

Page

Appendix A — Motion For Extension Of Time Dated May 26, 2000 ..... 1a

Appendix B — Order Of The United States Court Of Appeals For The Eleventh Circuit Granting Motion Of Appellant To File Brief Dated And Filed June 8, 2000 ..... 4a

Appendix C — Unopposed Motion For Leave To File Initial Brief Seven Days Out Of Time Dated July 12, 2000 ..... 7a

Appendix D — Appellant's Reply To Appellee's Response To Motion For Leave To File Initial Brief Seven Days Out Of Time Dated July 19, 2000 ..... 10a

Appendix E — Appellant's Motion To Set Aside Dismissal And Remedy Default Dated July 28, 2000 ..... 16a

Appendix F — Appellant's Reply To Appellee's Response To Motion To Reinstate Appeal Dated August 1, 2000 ..... 22a

Appendix G — Memorandum Of The United States Court Of Appeals For The Eleventh Circuit Re Rules And Internal Operating Procedures Dated December 1999 ..... 25a

STATEMENT OF JURISDICTION

On October 5, 2000, the United States Court of Appeals for the Eleventh Circuit ("Eleventh Circuit") rendered its final judgment below when it denied Jimenez's motion for reconsideration of its August 10, 2000 order denying Jimenez's motion to set aside the clerk's dismissal, which motion the Eleventh Circuit construed as a motion to reinstate the appeal. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

RULES OF APPELLATE PROCEDURE AT ISSUE

FED. R. APP. P. 31(c). Serving and Filing Briefs

> (c) *Consequences of Failure to File.* If an appellant fails to file a brief within the time provided by this rule, or within an extended time, an appellee may move to dismiss the appeal. An appellee who fails to file a brief will not be heard at oral argument unless the court grants permission.

11TH CIR. R. 31-2 Briefs and Record Excerpts in a Civil Appeal — Motion to Extend Time or to File Out of Time.

* * *

> (b) *First Request for an Extension of Time.* A party's first request for an extension of time to file a brief or record excerpts, or to correct a deficiency in a brief or record excerpts, must set forth good cause. A first request for an extension of seven calendar days or less may be made by

telephone or in writing, and may be granted by the clerk. A first request for an extension of more than seven calendar days must be made by written motion setting forth with particularity the facts demonstrating good cause, and will only be acted upon by the court. When a briefing schedule has been established by court order, a first request for an extension must be made by written motion and will only be acted upon by the court.

* * *

(d) *Second Request for an Extension of Time.* Second requests for an extension of time to file a brief or record excerpts, or to correct a deficiency in a brief or record excerpts, are extremely disfavored and are granted rarely. A party's second request for an extension will be granted only upon a showing of extraordinary circumstances that were not foreseeable at the time the first request was made. A second request must be made by written motion and will only be acted upon by the court.

(e) *Extension of Time Must be Requested Prior to Due Date.* A request for an extension of time to file a brief or record excerpts pursuant to this rule must be made or filed prior to the expiration of the due date for filing the brief or record excerpts. The clerk is without authority to file a party's motion for extension of time to file a brief or record excerpts received by the clerk after the expiration of the due date for filing the brief or record excerpts. A request for an extension of time to correct a deficiency in a brief or record excerpts

pursuant to this rule must be made or filed within 14 days of the clerk's notice as provided in 11th Cir. R. 42-3. The clerk is without authority to file a party's motion to correct a deficiency in a brief or record excerpts received by the clerk after the expiration of the 14-day period provided by that rule. [See 11th Cir. R. 42-2 and 42-3 concerning dismissal for failure to prosecute in a civil appeal.]

* * * *

11TH CIR. R. 42-2 ***Dismissal in a Civil Appeal for Appellant's Failure to File Brief or Record Excerpts by Due Date.***

* * *

(c) *Dismissal Without Further Notice.* When an appellant has failed to file the brief or record excerpts by the due date as established by 11th Cir. R. 31-1 and set forth in the clerk's notice, or if the due date has been extended by the court, within the time so extended, an appeal shall be treated as dismissed for failure to prosecute on the first business day following the due date. The clerk thereafter will enter an order dismissing the appeal and mail a copy of that order to counsel and pro se parties.

* * *

(e) *Motion to Set Aside Dismissal and Remedy Default.* An appeal dismissed pursuant to this rule may be reinstated only upon the timely filing of a motion to set aside the dismissal and remedy the

> default showing extraordinary circumstances, accompanied by the required brief and record excerpts. Such a motion showing extraordinary circumstances, accompanied by the required brief and record excerpts, must be filed within 14 days of the date the clerk enters the order dismissing the appeal. The timely filing of such a motion, accompanied by the required brief and record excerpts, and a showing of extraordinary circumstances, is the exclusive method of seeking to set aside a dismissal entered pursuant to this rule. An untimely filed motion to set aside dismissal and remedy default must be denied unless the motion demonstrates extraordinary circumstances justifying the delay in filing the motion, and no further filings shall be accepted by the clerk in that dismissed appeal.

* * * *

CONCISE STATEMENT OF THE CASE

On April 20, 2000, Jimenez timely filed a notice of appeal from the final summary judgment entered against him by the U.S. District Court for the Southern District of Florida on March 21, 2000 in the case styled *Mario Jimenez v. Hialeah Housing Authority*, Case No. 98-2779-CIV-DAVIS. App. D. On May 26, 2000, eleven days prior to the original deadline for filing his initial brief, Jimenez requested a 30-day extension of time in which to file his initial brief on the merits of his appeal. *See* Supp. App. A.[1] In support of his request for a 30-day

1. A supplemental appendix (Supp. App.) is required in order provide the Court with additional documentation from the record, omitted by Jimenez, but which is otherwise needed to evaluate Jimenez's petition.

extension of time, Jimenez cited to his counsel's illness. *Id.* The Eleventh Circuit granted Jimenez's request and set a July 6, 2000 deadline for Jimenez to file his initial brief. Supp. App. B.

Jimenez failed to comply with the Eleventh Circuit's July 6, 2000 deadline for filing his initial brief. Instead, Jimenez filed his brief on July 13, 2000, with an accompanying "unopposed" motion for leave to file the brief out of time. Supp. App. C. In actuality, Jimenez acknowledged in a subsequent pleading that counsel for the Authority had never agreed to Jimenez's filing of the initial brief seven days out of time. Supp. App. D at 4. In fact, counsel for Jimenez acknowledged that he never called counsel for the Authority after the July 6, 2000 deadline to indicate that the initial brief would be one week late. Supp. App. D at 3.

On July 26, 2000, the Clerk of the Eleventh Circuit dismissed Jimenez's appeal for want of prosecution. App. C. On July 28, 2000, Jimenez filed a motion to set aside dismissal and remedy default. Supp. App. E. In this motion, Jimenez again referred to his counsel's illness and noted that, at or about the time of the *original* request for extension of time, his counsel had unsuccessfully attempted to associate with co-counsel to assist in the preparation of the initial brief. *Id.* at 2. No indication is given in the motion that Jimenez ever again petitioned the Eleventh Circuit for relief from the briefing deadline *prior* to its expiration. On August 10, 2000, the Eleventh Circuit, through Circuit Judge James Edmonson, denied Jimenez's motion to set aside the dismissal and reinstate the appeal. App. B.

On August 22, 2000, Jimenez filed a motion for reconsideration of the August 10, 2000 decision denying his prior motion to set aside the dismissal and requested reinstatement of the appeal. As noted above, the Eleventh Circuit denied the motion for reconsideration on October 5, 2000.

REASONS FOR DENYING THE WRIT

THE ELEVENTH CIRCUIT'S DECISION BELOW, WHICH RELATED TO THE JUDICIAL ADMINISTRATION OF ITS OWN DOCKET, DOES NOT GIVE RISE TO A CONFLICT WITH A PRECEDENT OF THIS COURT OR THAT OF ANY OTHER COURT OF APPEALS.

This Court grants petitions for writ of certiorari only for "compelling reasons." Sup. Ct. R. 10. Generally, a petition will be granted only when the petitioner demonstrates that the ruling rendered by the court of appeals in question: (a) conflicts with that of another court of appeals on the same important matter; or (b) conflicts with relevant decisions of this Court. Sup. Ct. R. 10(a) and (c).[2] "A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10.

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2. Supreme Court Rule 10 cites to other bases for granting a petition for writ of certiorari, but those bases are inapplicable under the facts of this case. Jimenez appears to base his petition on the purported existence of a conflict with precedent. Petition at 5. Jimenez does not articulate a particular, important question of federal law that has not been, but should be, settled by this Court; nor does he advocate that the Eleventh Circuit's decision so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

A. The Eleventh Circuit's Decision Below Does Not Give Rise to a Conflict with a Decision of Another Court of Appeals.

Jimenez has failed to demonstrate that the Eleventh Circuit's decision to administer its docket in the manner it did by refusing to reinstate his appeal conflicts with the precedents of another court of appeals regarding the same important matter. In this particular instance, Jimenez's counsel, according to his own assertions, was aware of his illness and the consequences that might result from it since the time he filed the notice of appeal. In fact, Jimenez requested and obtained a 30-day extension of time to file his initial brief. During this extension and the period before, Jimenez was presumably diligently prosecuting his appeal. In his motion to reinstate the appeal, Jimenez acknowledged that his counsel was aware of his condition during the period of extension and attempted to associate with co-counsel to assist in the preparation of the initial brief. Supp. App. E, at p. 2. Despite failing to obtain the assistance of co-counsel, Jimenez never petitioned the Eleventh Circuit prior to the expiration of the extended deadline to obtain an additional extension of time.

Rule 31-2(e) of the Eleventh Circuit specifically requires that any requests for extension of time to file a brief "must be made or filed prior to the expiration of the due date for filing the brief. . . ." Jimenez failed to comply with this rule, choosing instead to file his initial brief in belated fashion and request that the Eleventh Circuit accept it "out of time."[3]

3. Jimenez asserts that his counsel made a mistake in relying upon a prior rule of the Eleventh Circuit that permitted briefs to be filed "out of time." Supp. App. F at 2. However, in December 1999, (Cont'd)

Significantly, Jimenez *never* explains why his counsel, assuming he had been incapacitated from July 1-6, 2000, failed to petition the Eleventh Circuit for relief from the briefing deadline when he learned that he would not be able to meet it. Instead, Jimenez waited an additional seven days to file his brief and then improperly informed the court that his belated filing was "unopposed" by the Authority.

Each court of appeals that has addressed the issue has recognized its inherent power to administer and regulate its docket and take appropriate action with respect to those practitioners and parties who fail to comply with the court's procedural rules. *See, e.g.*, *Reyes-Garcia v. Rodriguez & Del Valle, Inc.*, 82 F.3d 11 (1st Cir. 1996) (party's noncompliance with appellate rules constitutes sufficient cause to dismiss appeal); *Wrighten v. Glowski*, 232 F.3d 119 (2d Cir. 2000) (dismissing appeal for failure to provide portions of record after extension of time); *Brooks v. Fitch*, 642 F.2d 46 (3d Cir. 1981) (appeal dismissed for failure to comply with appellate procedures); *Louisiana World Exposition, Inc. v. Logue*, 746 F.3d 1033 (5th Cir. 1984) (dismissal of appeal for failure to file timely brief is within appellate court's discretion); *Morales v. American Honda Motor Co., Inc.*, 151 F.3d 500 (6th Cir. 1998) (failure to comply with appellate procedural requirements may result in dismissal of appeal); *United States v. Sosa*, 55 F.3d 278 (7th Cir. 1995) (failure to file a timely brief is grounds for dismissing appeal); *Slack v. St. Louis County Government*, 919 F.2d 98 (8th Cir. 1990)

(Cont'd)
the Eleventh Circuit admonished members of its bar to take special notice of that court's new *more stringent* requirements for obtaining extensions of time and the consequences for failing to abide by those requirements. A copy of the Eleventh Circuit's notice to practitioners is included at Supp. App. G.

(appeals that fail to comply with appellate rules governing briefs are subject to dismissal); *Guam Sasaki Corp. v. Diana's Inc.*, 881 F.2d 713 (9th Cir. 1989) (appellate court has discretion to dismiss appeal for failure to abide by court's rules); *United States v. Hanks*, 24 F.3d 1235 (10th Cir. 1994) (appeal dismissed for failure to comply with non-jurisdictional filing deadline); *LaParade v. Kidder Peabody & Co.*, 1997 WL 529072 (D.C. Cir. 1997) (appeal dismissed for failure to timely file brief or motion for extension of time); *Julien v. Zeringue*, 864 F.2d 1572 (Fed. Cir. 1989) (failure to comply with requirements for filing briefs may result in dismissal of appeal).

The court of appeals decisions relied upon by Jimenez do not give rise to a conflict with the decision below. First, none of the cases cited by Jimenez was decided subsequent to the Eleventh Circuit's notification to practitioners of its adoption of more stringent requirements for requesting and obtaining extensions of time. Second, the fact that various courts of appeals have expressed a preference for resolving appeals on the merits, rather than on "mere technicalities," does not deprive the Eleventh Circuit of the authority to administer its own docket and require parties to comply with filing deadlines, particularly extended deadlines that the party requested and obtained. In *Jones v. Chaney & James Const. Co.*, 399 F.3d 84 (5th Cir. 1968), the court simply concluded that a technical defect in the form of the *notice of appeal* did not *require* dismissal since the form was the functional equivalent of what was required by the rule.[4] In *Morrison v. Texas Co.*,

4. Additionally, it should be noted that *Jones* is a binding precedent of the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (*en banc*) (adopting pre-1981 Fifth (Cont'd)

289 F.2d 382 (7th Cir. 1961), the Seventh Circuit noted that an appendix to a brief that substantially complies with the requirements of the rule does not *require* dismissal of the appeal. *Id.* at 385.[5] Neither *Jones* nor *Morrison* is particularly instructive in this case.

Jimenez's reliance on *Marcaida v. Rascoe*, 569 F.2d 828 (5th Cir. 1978) and *Tidwell v. Dees*, 464 F.2d 1297 (5th Cir. 1967) is similarly misplaced, since both cases are precedents *within* the Eleventh Circuit and neither case gives rise to a conflict with the decision below. In *Marcaida*, the court simply held that the failure to file a timely brief is not a jurisdictional bar that requires dismissal of an appeal in each instance. *Marcaida*, 569 F.2d at 830. In *Tidwell*, not only does the opinion fail to give rise to a conflict, the court specifically affirmed the proposition that a court of appeals has the discretion under FED. R. APP. P. 31 to dismiss an appeal for failure to file a timely brief. *Tidwell*, 464 F.2d at 1297-98.

(Cont'd)
Circuit decisions are binding precedent). The Eleventh Circuit noted no conflict with *Jones* and petitioner argued no such conflict below. Any conceivable conflict intra-circuit should more efficiently be resolved by the Eleventh Circuit *en banc* and not by this Court. *Taylor v. United States*, 493 U.S. 906, 110 S. Ct. 265 (1989) ("Because the petition does not identify any *inter-Circuit* conflict concerning the question presented . . . the Court's denial of certiorari today is entirely consistent with rules governing the management of our certiorari docket." [emphasis in the original])

5. Moreover, the Seventh Circuit has since made it clear that dismissal of an appeal is appropriate for failure to timely file a brief. *Sosa*, *supra*.

Finally, Jimenez's reliance on an alleged conflict between the decision below and the Sixth Circuit's decision in *Matute v. Procoast Navigation, Ltd.*, 928 F.2d 627 (3d Cir. 1991), *cert. denied*, 502 U.S. 919, 112 S. Ct. 329 (1991), is unavailing.[6] In *Matute*, which is factually inapposite, the Third Circuit recognized that a court of appeal has the discretion *not* to dismiss an appeal if "extraordinary and compelling circumstances" are established.[7] Jimenez admits that his counsel, upon returning from his illness on the deadline for filing the brief, failed to request an additional extension of time from the Eleventh Circuit. Petition at 4. Instead, Jimenez's counsel remained silent and waited an additional week to file the brief out of time. Jimenez's counsel should have been aware of the procedural requirements of the Eleventh Circuit and complied with them. *See Pinion v. Dow Chemical*, 928 F.2d 1522, 1533 (11th Cir. 1991) (counsel has a duty to familiarize himself with the appellate rules); *see also FHC Equities, L.L.C. v. MBL Life Assurance Corp.*, 188 F.3d 678, 684-687 (6th Cir. 1999) (attorney error in interpreting federal rules does not constitute excusable neglect).

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6. Jimenez's assertion that this Court has, by *implication* and denial of certiorari, approved the holding in *Matute* is entirely improper. Petition at 3. As Justice Frankfurter noted, "The Court has stated again and again what the denial of a petition for writ of certiorari means and more particularly what it does not mean. Such a denial, as has been repeatedly stated, 'imports no expression of opinion upon the merits of the case.' [citations omitted]" *Agoston v. Commonwealth of Pennsylvania*, 340 U.S. 844, 71 S. Ct. 9 (1950).

7. The Eleventh Circuit has adopted this standard. *See* 11TH CIR. R. 42-2(e). Since the Eleventh Circuit's standard is consistent with that of the Sixth Circuit, as articulated in *Matute*, no conflict arises. *See also* Sup. Ct. R. 10 ("A petition for writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law.")

B. The Eleventh Circuit's Decision Below Does Not Conflict with a Precedent of this Court.

This Court has specifically recognized the authority of a court of appeals to dismiss an appeal for failure of a party to comply with a scheduling order established by the court of appeal. *Thomas v. Arn*, 474 U.S. 140, 146-147, 106 S. Ct. 466, 470-471 (1985). More generally, the Court has also acknowledged the discretion of a court of appeals to dismiss an appeal for want of prosecution. *Link v. Wabash R. Co.*, 370 U.S. 626, 633, 82 S. Ct. 1386, 1390 (1962).

In his conclusion, Jimenez does not appear to argue that the Eleventh Circuit's decision below conflicts with a precedent of this Court. Instead, he suggests that a conflict arises because of some undisclosed precedent adopted by implication by the Court. Petition at 5. As noted in footnote 6, *supra*, no implication can be derived from the Court's denial of certiorari in *Matute*. Since Jimenez presents no other argument regarding an alleged conflict between the decision below and a precedent of this Court, certiorari should not be granted on this basis.[8]

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8. Jimenez cites in passing to *Foman v. Davis*, 371 U.S. 178, 83 S. Ct. 227 (1962) for the proposition that appeals should be decided, when possible, on the merits rather than on technicalities. Petition at 3. This holding does not conflict with the Eleventh Circuit's decision to enforce its procedural rules and dismiss Jimenez's appeal for failure to file a timely brief after he requested and received a 30-day extension of time.

CONCLUSION

Jimenez has failed to articulate a recognized basis for the Court to exercise its discretionary power to review the decision below by writ of certiorari. While Jimenez's petition makes repeated references to alleged conflicts created by the Eleventh Circuit's decision, no such conflict exists. The cases cited by Jimenez are not in conflict with the Eleventh Circuit's refusal to reinstate an appeal that was dismissed after Jimenez requested and obtained an extension of time to file his initial brief, yet failed to abide by the requested deadline. Not only did Jimenez fail to abide by the extended deadline, he failed to comply with the Eleventh Circuit's procedures for requesting an additional extension of time and acknowledged his counsel's lack of familiarity with the procedural rules of the Eleventh Circuit. Under these facts, the Authority would respectfully request that the Court deny Jimenez's petition for writ of certiorari.

Respectfully submitted,

EDWARD G. GUEDES
WEISS SEROTA HELFMAN
PASTORIZA & GUEDES, P.A.
Attorneys for Respondent
2665 South Bayshore Drive
Suite 420
Miami, Florida 33133
(305) 854-0800

APPENDIX

APPENDIX A — MOTION FOR EXTENSION OF TIME DATED MAY 26, 2000

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

CASE NO: 00-12139-C

MARIO JIMENEZ,

Plaintiff/Appellant

vs.

HIALEAH HOUSING AUTHORITY, a political subdivision of the City of Hialeah,

Defendant/Appellee.

MOTION FOR EXTENSION OF TIME

Appellant MARIO JIMENEZ, through undersigned counsel and pursuant to FRAP 26(b) and 11th Cir. R. 31-2, respectfully moves this Honorable Court to grant him a 30-day extension of time to file his answer brief and appendix, up to and including July 6, 2000, and as and for good cause would show as follows:

1. Appellant's initial brief and appendix are due on or before June 6, 2000.

2. Plaintiff's undersigned counsel (who is a sole practitioner) is suffering from acute hepatitis B, liver malfunction and chronic diabetes that required his recent

unexpected hospitalization for approximately two weeks. Upon his release from the hospital, the medical prognosis for undersigned counsel is that the debilitating symptoms of his illness will linger for the next 2-3 months.

3. Because of his illness and the press of other work, the undersigned counsel requires a 30-day extension, up to and including July 6, 2000.

4. The undersigned counsel has conferred with Appellee's counsel who opposes an extension request longer than seven (7) days.

5. This motion is being made for good cause and not for the purpose of delay, and the granting hereof will not prejudice any party.

WHEREFORE, Appellant MARIO JIMENEZ respectfully prays that this Court will extend by an additional 30 days, up to and including July 6, 2000, the deadline for him to file his initial brief and appendix in this cause.

I HEREBY CERTIFY that a true and correct copy of the foregoing was telecopied and mailed this 26th day of May, 2000 to: **Edward G. Guedes, Esq.**, Weiss, Serota, Helfman, Pastoriza & Guedes, P.A., Attorneys for Defendant, 2665 South Bayshore Drive, Suite #420, Miami, FL. 33133.

Appendix A

MANZINI & ASSOCIATES, P.A.
Attorneys for Appellant
169 E. Flagler St. – #1500
Miami, FL. 33131
Telephone: (305) 577-9903
Fax No: (305) 577-6121

By: s/ Nicolas A. Manzini
NICOLAS A. MANZINI
Fla. Bar No: 248827

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT GRANTING MOTION OF APPELLANT TO FILE BRIEF DATED AND FILED JUNE 8, 2000

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No: 00-12139-CC

MARIO JIMENEZ,

Plaintiff-Appellant

versus

THE HIALEAH HOUSING AUTHORITY, a political subdivision of the City of Hialeah,

Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of Florida

ORDER:

Motion of Appellant for an extension to file his brief to, and including, July 6, 2000 is granted.

s/ Frank M. Hull
UNITED STATES CIRCUIT JUDGE

Appendix B

United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Thomas K. Kahn
Clerk

In Replying Give Number
Of Case And Names of Parties

June 08, 2000

MEMORANDUM TO COUNSEL OR PARTIES

RE: 00-12139-CC
Mario Jimenez v. The Hialeah Housing Authority
DC DKT NO.: 98-02779 CV-EBD

The following action has been taken in the referenced case:

The enclosed order has been ENTERED.

Sincerely,

THOMAS K. KAHN, Clerk

Reply To: Jenifer Alexander
(404) 335-6172

Clerk 4043356100

M/Ext of Time 5/00

Appendix B

Edward G. Guedes
Weiss, Serota, Helfman, et al.
Suite 420, 2665 South Bayshore Drive
Miami FL 33133

June 08, 2000

RE: 00-12139-CC
Mario Jimenez v. The Hialeah Housing Authority
DC DKT NO.: 98-02779 CV-EBD

CC: Edward G. Guedes

CC: Nicolas A. Manzini

CC: Michelle Marie Gallardo

CC: Administrative File

APPENDIX C — UNOPPOSED MOTION FOR LEAVE TO FILE INITIAL BRIEF SEVEN DAYS OUT OF TIME DATED JULY 12, 2000

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT
CASE NO: 00-12139-C

MARIO JIMENEZ,

Plaintiff/Appellant

vs.

HIALEAH HOUSING AUTHORITY, a political subdivision of the City of Hialeah,

Defendant/Appellee.

UNOPPOSED MOTION FOR LEAVE TO FILE INITIAL BRIEF SEVEN DAYS OUT OF TIME

Appellant MARIO JIMENEZ, through undersigned counsel and pursuant to all applicable Federal Rules of Appellate Procedure and Eleventh Circuit Rules, respectfully moves this Honorable Court for leave to file his initial brief seven days out of time, that is, on July 13, 2000, and as and for good cause would show as follows:

1. The Court previously granted Appellant an extension of time, up to and including July 6, 2000, for filing his initial brief.

2. Unfortunately, due to his recurring illness (hepatitis B and chronic diabetes) and complication, the undersigned counsel was unable to complete preparation of Appellant's initial brief by the extended deadline (July 6, 2000).

3. The undersigned counsel requests leave of Court to file Appellant's initial brief seven days out of time, that is, on July 13, 2000.

4. The undersigned counsel has conferred with counsel for Appellee HIALEAH HOUSING AUTHORITY prior to filing this motion and is authorized to represent that he does not oppose this motion.

5. This motion is being filed in good faith (due to illness of the undersigned counsel) and not for the purpose of delay or prejudice.

WHEREFORE, Appellant MARIO JIMENEZ respectfully prays for leave to file his initial brief seven days out of time, that is, on July 13, 2000.

I HEREBY CERTIFY that a true and correct copy of the foregoing was telecopied and mailed this 12th day of July, 2000 to: **Edward G. Guedes, Esq.**, Weiss, Serota, Helfman, Pastoriza & Guedes, P.A., Attorneys for Defendant, 2665 South Bayshore Drive, Suite #420, Miami, FL. 33133.

Appendix C

MANZINI & ASSOCIATES, P.A.
Attorneys for Appellant
169 E. Flagler St. – #1500
Miami, FL. 33131
Telephone: (305) 577-9903
Fax No: (305) 577-6121

By: s/ Nicolas A. Manzini
NICOLAS A. MANZINI
Fla. Bar No: 248827

APPENDIX D — APPELLANT'S REPLY TO APPELLEE'S RESPONSE TO MOTION FOR LEAVE TO FILE INITIAL BRIEF SEVEN DAYS OUT OF TIME DATED JULY 19, 2000

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

CASE NO: 00-12139-C

MARIO JIMENEZ,

Plaintiff/Appellant

vs.

HIALEAH HOUSING AUTHORITY, a political subdivision of the City of Hialeah,

Defendant/Appellee.

APPELLANT'S REPLY TO APPELLEE'S RESPONSE TO MOTION FOR LEAVE TO FILE INITIAL BRIEF SEVEN DAYS OUT OF TIME

Appellant MARIO JIMENEZ, through undersigned counsel and pursuant to all applicable rules, files this his reply to Appellee HIALEAH HOUSING AUTHORITY's response to his motion for leave to file initial brief seven days out of time and states as follows:

1. For the past 4½ four months, undersigned counsel has suffered from acute hepatitis B, liver malfunction and chronic diabetes and was placed on "disability" status by

his private insurer (New England Financial). As of today, undersigned counsel has still not been able to resume work on a full-time basis. The symptoms of his illnesses are severe nausea, vomiting, dizzy spells, fatigue and the inability to concentrate. Although undersigned counsel's medical condition is improving, his ability to work and to resume normal life activities is still a day-to-day and week-to-week matter. Undersigned counsel has been hospitalized twice because of his illnesses.

2. Due to the illnesses of undersigned counsel, the Court previously granted an extension of time of up to and including July 6, 2000 for Appellant to file his initial brief. Within the limitations of his illnesses, undersigned counsel worked assiduously to complete Appellant's initial brief by the extended deadline. Further, he attempted to associate co-counsel to assist him in the preparation of the initial brief. However, because this is an appeal from an adverse summary judgment dismissing Appellant's employment discrimination case and due to the nature of his fee arrangement with Appellant (contingency fee), undersigned counsel was unsuccessful in his efforts to secure the assistance of another lawyer to work on this appeal.

3. During the extended weekend of July 1-4, 2000, undersigned counsel became severely ill and unable to eat or drink, resulting in his dehydration and requiring round-the-clock bed rest. Around midday on July 5, 2000, undersigned counsel came to the realization that he would not be able to complete Appellant's initial brief by the extended deadline (July 6, 2000). Therefore, he contacted Appellee's counsel

early on July 6th to inform him that he would need "an extra day or two" to complete Appellant's initial brief to which Appellee's counsel replied "no problem".

4. Thereafter, even before he could complete Appellant's initial brief, undersigned counsel prepared an "Unopposed" motion for leave to file the brief out of time wherein he recited that Appellee's counsel had no objection to said motion. Undersigned counsel continued to work diligently toward his goal of completing Appellant's initial brief but was unable to do so before July 12, 2000, that is, six days passed the extended deadline.

5. On July 12, 2000, undersigned counsel overnighted Appellant's initial brief to the Court for filing the next day (July 13th), along with a motion for leave to file the initial brief seven days out of time. Through oversight, undersigned counsel neglected to call Appellee's counsel again to ascertain whether he opposed the motion now that the filing of Appellant's initial brief had been delayed a total of seven days past the extended deadline (July 6, 2000).

6. Undersigned counsel's failure to contact Appellee's counsel a second time was inadvertent. Nevertheless, in light of his health problems (which Appellee's counsel has known about for several months), undersigned counsel did not reasonably expect that Appellee would object to the filing of Appellant's initial brief seven days past the extended deadline (July 6, 2000).

7. Undersigned counsel apologizes for the apparent misunderstanding created by his failure to contact Appellee's

counsel a second time to ascertain his position with respect to the late filing of Appellant's initial brief after it became obvious that more than "an extra day or two" would be required. Undersigned counsel acknowledges that Appellee's counsel did not expressly authorize him to represent to the Court that Appellant's motion for leave to file initial brief seven days out of time was "unopposed". The July 6, 2000 agreement between counsel was that Appellee would not oppose Appellant's request of "an extra day or two" to file the initial brief, period.

8. Undersigned counsel realized that for the first time Appellee objected to his request for permission to file the initial brief seven days out of time on July 13, 2000 when he received a telecopy of Appellee's response to the motion for leave to file the brief seven days out of time, which response stated Appellee's objection. Despite the misunderstanding between counsel, Appellee's response to Appellant's motion for leave to file his initial brief seven days out of time is unduly and unnecessarily harsh. Appellee demands dismissal of this appeal because, "Appellant failed to request a second extension of time in advance of the July 6, 2000 deadline, in violation of Eleventh Cir. R. 31-2(e)."

9. However, it is manifestly clear that the unforeseeable "extraordinary circumstances" required by Eleventh Cir. R. 31-2(d) why Appellant was unable to request an additional extension of time before the expiration of the extended deadline (July 6, 2000) have been established. As shown above, on July 1, 2000, just five days before the extended deadline for filing Appellant's initial brief, undersigned counsel's health took an unexpected turn for the worse.

Undersigned counsel, who is a sole practitioner, remained bedridden until the very day that Appellant's initial brief was due (July 6, 2000). Undersigned counsel was thus unable to request an additional extension to file Appellant's initial brief before the expiration of the extended deadline (July 6th).

10. As a result, Appellant was left with no choice but to file his initial brief belatedly along with his motion for leave to file the brief seven days out of time. In light of these circumstances, the earliest date when undersigned counsel could have filed a request for an additional extension was July 6, 2000, that is, the very day when Appellant's initial brief was due. Even if undersigned counsel had overnighted an extension request to the Court on July 6th, the Court would have received the extension request no sooner than July 7th, that is, after the expiration of the extended deadline for filing the initial brief. At all times, undersigned counsel made a reasonable and good faith attempt to comply with this Court's rules and with the extended deadline for filing Appellant's initial brief.

WHEREFORE, Appellant MARIO JIMENEZ respectfully prays that this Court will overrule Appellee HIALEAH HOUSING AUTHORITY's objection to his motion for leave to file initial brief seven days out of time and that the Court will grant said motion based for good cause shown.

I HEREBY CERTIFY that a true and correct copy of the foregoing was telecopied and mailed this 19th day of July, 2000 to: **Edward G. Guedes, Esq.**, Weiss, Serota, Helfman, Pastoriza & Guedes, P.A., Attorneys for Defendant, 2665 South Bayshore Drive, Suite #420, Miami, FL. 33133.

Appendix D

MANZINI & ASSOCIATES, P.A.
Attorneys for Appellant
169 E. Flagler St. – #1500
Miami, FL. 33131
Telephone: (305) 577-9903
Fax No: (305) 577-6121

By: s/ Nicolas A. Manzini
NICOLAS A. MANZINI
Fla. Bar No: 248827

APPENDIX E — APPELLANT'S MOTION TO SET ASIDE DISMISSAL AND REMEDY DEFAULT DATED JULY 28, 2000

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

CASE NO: 00-12139-C

MARIO JIMENEZ,

Plaintiff/Appellant

vs.

HIALEAH HOUSING AUTHORITY, a political subdivision of the City of Hialeah,

Defendant/Appellee.

APPELLANT'S MOTION TO SET ASIDE DISMISSAL AND REMEDY DEFAULT

Appellant MARIO JIMENEZ, through undersigned counsel and pursuant to 11th Cir. R. 42-2(e), respectfully moves this Honorable Court to set aside the Clerk's entry of dismissal dated July 26, 2000 and to remedy the default by showing the following extraordinary circumstances:

1. For the past 5 months, undersigned counsel has suffered from acute hepatitis B, liver malfunction and chronic diabetes and has been on "disability" status with his private insurer (New England Financial). As of today, undersigned counsel has still not been able to resume work on a full-time

basis. The symptoms and effects of his illnesses are severe nausea, vomiting, dizzy spells, fatigue and the inability to concentrate. Although undersigned counsel's medical condition is improving, his ability to work and to resume normal life activities is still a day-to-day and week-to-week matter. Undersigned counsel has been hospitalized twice because of his illnesses.

2. Due to the illnesses of undersigned counsel, the Court previously granted an extension of time of up to and including July 6, 2000 for Appellant to file his initial brief. Within the limitations of his illnesses, undersigned counsel worked diligently to complete Appellant's initial brief by the extended deadline. Further, he attempted to associate co-counsel to assist him in the preparation of the initial brief. However, because this is an appeal from an adverse summary judgment dismissing Appellant's employment discrimination case and due to the nature of his fee arrangement with Appellant (contingency fee), undersigned counsel was unsuccessful in his efforts to secure the assistance of another lawyer to work on this appeal.

3. During the extended weekend of July 1-5, 2000, undersigned counsel became severely ill and unable to eat or drink, resulting in his dehydration and requiring round-the-clock bed rest. On July 5, 2000, while still bedridden, undersigned counsel came to the realization that he would not be able to complete Appellant's initial brief by the extended deadline (July 6, 2000). He contacted Appellee's counsel early on July 6th to advise him he would need "an extra day or two" to complete the brief.

Appendix E

4. Thereafter, undersigned counsel worked through the week of July 7-9, 2000 toward his goal of completing Appellant's initial brief as quickly as possible but was unable to do so before July 12, 2000, that is, six days past the extended deadline.

5. On July 12, 2000, undersigned counsel overnighted Appellant's initial brief and record excerpts to the Court for filing the next day (July 13th), along with a motion for leave to file the initial brief seven days out of time.

6. The extraordinary circumstances required by Eleventh Cir. R. 42-2(e) why Appellant was unable to request an additional extension of time before the expiration of the extended deadline (July 6, 2000) are present here. As shown above, on July 1, 2000, just five days before the extended deadline for filing Appellant's initial brief, undersigned counsel's health took a sudden and unexpected turn for the worse. Undersigned counsel, who is a sole practitioner, remained bedridden until the very day when Appellant's initial brief was due (July 6, 2000). Undersigned counsel was thus unable to request an additional extension to file Appellant's initial brief before the expiration of the extended deadline (July 6th) due to extraordinary circumstances that were unforeseeable.

7. As a result, Appellant was left with no choice but to file his initial brief belatedly along with his motion for leave to file the brief seven days out of time, which he overnighted to the Court on July 12, 2000. In light of these circumstances, the earliest date when undersigned counsel could have filed a request for an additional extension was July 6, 2000, that

is, the very day when Appellant's initial brief was due. Even if undersigned counsel had overnighted an extension request to the Court on July 6th, the Court would have received the extension request no sooner than July 7th, that is, after the expiration of the extended deadline for filing the initial brief.

8. At all pertinent times, undersigned counsel made a reasonable and good faith attempt to comply with this Court's rules and with the extended deadline for filing Appellant's initial brief and record excerpts.

9. On July 13, 2000, Appellant's motion for leave to file initial brief seven days out of time was stamped by the Clerk. The motion is attached hereto and marked Exhibit "1". Along with his motion, Appellant filed the original and six copies of his brief and the original and four copies of his record excerpts.

10. On July 13, 2000, undersigned counsel received a telecopy of Appellee HIALEAH HOUSING AUTHORITY's response to his motion for leave to file initial brief seven days out of time, which response stated an objection to Appellant's motion.

11. On July 20, 2000, Appellants reply to Appellee's response to motion for leave to file initial brief seven days out of time was stamped by the Clerk. The reply is attached hereto and marked Exhibit "2".

12. On July 28, 2000, undersigned counsel received from the Clerk a) the original and six copies of Appellant's initial brief stamped July 13, 2000, b) the original and four

copies of Appellant's record excerpts stamped July 13, 2000, c) the motion for leave to file initial brief seven days out of time stamped July 13, 2000, d) Appellant's reply to Appellee's response to motion for leave to file brief seven days out of time stamped July 13, 2000, and e) the Clerk's entry of default dated July 26, 2000.

13. Upon receipt of the documents described in paragraph 12 above, undersigned counsel contacted the Clerk telephonically and was advised to seek reinstatement of this appeal through the filing of the within motion.

14. Undersigned counsel has contacted Appellee's counsel who stated that he does not agree to the granting of this motion but will leave it up to the Court to decide.

15. This motion is not being filed for the purpose of delay or for any other improper purpose. No demonstrable prejudice or other hardship will be visited upon either party or counsel by the granting of this motion. This appeal from a final summary judgment has been pending for approximately four months. It is manifestly clear that the extraordinary circumstances that prevented Appellant from applying for an additional extension before July 6, 2000 (i.e., the sudden and unexpected recurrence of the effects of undersigned counsel's illnesses) were unforeseeable. Appellant should not be deprived of his right to have this Court review the district court's erroneous final summary judgment.

Appendix E

WHEREFORE, Appellant MARIO JIMENEZ respectfully prays that the Court will grant this motion and set aside the Clerk's entry of dismissal and let him remedy his default by allowing him to file his initial brief and record excerpts. (Attached hereto are the original and six copies of Appellant's initial brief and the original and four copies of Appellant's record excerpts).

I HEREBY CERTIFY that a true and correct copy of the foregoing was telecopied and mailed this 28th day of July, 2000 to: **Edward G. Guedes, Esq.**, Weiss, Serota, Helfman, Pastoriza & Guedes, P.A., Attorneys for Defendant, 2665 South Bayshore Drive, Suite #420, Miami, FL. 33133.

MANZINI & ASSOCIATES, P.A.
Attorneys for Appellant
169 E. Flagler St. – #1500
Miami, FL. 33131
Telephone: (305) 577-9903
Fax No: (305) 577-6121

By: s/ Nicolas A. Manzini
NICOLAS A. MANZINI
Fla. Bar No: 248827

APPENDIX F — APPELLANT'S REPLY TO APPELLEE'S RESPONSE TO MOTION TO REINSTATE APPEAL DATED AUGUST 1, 2000

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

CASE NO: 00-12139-C

MARIO JIMENEZ,

Plaintiff/Appellant

vs.

HIALEAH HOUSING AUTHORITY, a political subdivision of the City of Hialeah,

Defendant/Appellee.

APPELLANT'S REPLY TO APPELLEE'S RESPONSE TO MOTION TO REINSTATE APPEAL

Appellant MARIO JIMENEZ, through undersigned counsel and pursuant to all applicable rules, replies to Appellee HIALEAH HOUSING AUTHORITY's response to his motion to reinstate appeal and states:

1. In its response, Appellee appears to be somewhat incredulous of a) the seriousness of undersigned counsel's illnesses, and b) the reason why undersigned counsel was unable to apply for an additional extension to file Appellant's initial brief before the deadline expired (July 6, 2000).

Appendix F

2. Attached hereto as Exhibit "1" is a letter dated June 23, 2000 to undersigned counsel from New England Financial. New England Financial is undersigned counsel's disability insurer. As evidenced by the letter, undersigned counsel a) was considered totally disabled until July 17, 2000, and b) as of June 23, 2000, that is, just thirteen days before the deadline to file Appellant's initial brief, undersigned counsel's health had improved to the point that he expected to return to work in the immediate future. Logically, undersigned counsel believed he could complete and file Appellant's brief on time.

3. Unfortunately, as explained in comprehensive detail in Appellant's motion to reinstate this appeal, undersigned counsel's health took a sudden and unexpected turn for the worse on July 1, 2000. Undersigned counsel (a sole practitioner) was bedridden until July 6, 2000. Based upon the Court's prior rules, undersigned counsel was under the impression that the proper procedure (after the expiration of the deadline to file the brief) was to submit the brief and record excerpts along with a motion to file the brief out of time. That is precisely what undersigned counsel did on July 12, 2000. The Clerk received the brief and record excerpts and Appellant's motion to file them out of time on July 13, 2000.

4. Appellant's first knowledge that his motion for leave to file his brief and record excerpts out of time had not been "filed" and that this appeal was dismissed by the Clerk came on July 28, 2000, when all of said documents were returned to him. Appellant immediately tried to cure his default by filing a timely motion to reinstate this appeal, along with his brief and record excerpts.

Appendix F

WHEREFORE, based upon the extraordinary circumstances shown here and in his motion to set aside the Clerk's entry of dismissal, Appellant MARIO JIMENEZ respectfully prays that this Honorable Court will reinstate this appeal and direct the Clerk to accept his brief and record excerpts for filing in this cause.

I HEREBY CERTIFY that a true and correct copy of the foregoing was telecopied and mailed this 1st day of August, 2000 to: **Edward G. Guedes, Esq.**, Weiss, Serota, Helfman, Pastoriza & Guedes, P.A., Attorneys for Defendant, 2665 South Bayshore Drive, Suite #420, Miami, FL. 33133.

MANZINI & ASSOCIATES, P.A.
Attorneys for Appellant
169 E. Flagler St. – #1500
Miami, FL. 33131
Telephone: (305) 577-9903
Fax No: (305) 577-6121

By: s/ Nicolas A. Manzini
NICOLAS A. MANZINI
Fla. Bar No: 248827

APPENDIX G — MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT RE RULES AND INTERNAL OPERATING PROCEDURES DATED DECEMBER 1999

United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Thomas K. Kahn
Clerk

Norman E. Zoller
Circuit Executive

December 1999

MEMORANDUM

We are pleased to enclose revisions to the Rules and Internal Operating Procedures (IOPs) of the Eleventh Circuit that take effect on January 1, 2000. Please insert the enclosed replacement pages into your existing copy of the rules in the manner set forth on the reverse of this memorandum.

The court adopted *MORE STRINGENT* procedures for requesting extensions of time to file briefs and record excerpts in civil appeals. The revised rules distinguish between a party's *first* request for an extension of time of *seven calendar days or less*, a party's *first* request for an extension of time of *more than seven calendar days*, and a party's *second* request for an extension of time. *See* 11th Cir. R. 31-2. ***PRACTICE NOTE***: Standards for granting a second request are higher than the standards for granting a first request. Parties are well advised to properly plan and make the first request appropriate and accurate.

Appendix G

The court also adopted *MORE STRINGENT* rules that provide for **DISMISSAL WITHOUT FURTHER NOTICE** in civil appeals when appellant fails to file or correct a brief or record excerpts within the time permitted, and that establish *MORE STRINGENT* procedures for requesting **reinstatement** of a civil appeal thus dismissed. *See* 11th Cir. R. 42-2 and 42-3.

The revised circuit rules and IOPs are available on the Internet at **www.ca11.uscourts.gov**. All future rules revisions will be available on the Internet.

We welcome comments and suggestions concerning our local rules and internal operating procedures.

s/ Thomas K. Kahn	s/ Norman E. Zoller
Thomas K. Kahn	Norman E. Zoller
Clerk of Court	Circuit Executive